

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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JUN 29 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

ORIGINAL

In the Matter of)

Implementation of Section 19 of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)

CS Docket No. 94-48

Annual Assessment of the Status)
of Competition in the Market)
for the Delivery of Video)
Programming)

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TO: The Commission

COMMENTS
OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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Dated: June 29, 1994

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 Attachment A Letter to the Honorable Reed Hundt from Representatives Billy Tauzin, Rick Boucher, Ron Wyden, Jim Cooper, Jim Slattery, Blanche Lambert, Ralph Hall and Mike Synar, dated June 15, 1994.	

SUMMARY

NRTC appreciates this opportunity to share its experiences as a Multichannel Video Programming Distributor (MVPD) serving rural areas of the country through Home Satellite Dish ("HSD") and Direct Broadcast Satellite ("DBS") technologies. Although many satellite broadcast and cable programming vendors have adjusted their pricing practices and other conduct following passage of the 1992 Cable Act and adoption of the Commission's implementing rules, major stumbling blocks continue to prevent NRTC from obtaining full access to satellite delivered programming on fair and nondiscriminatory terms and conditions.

As a C-Band distributor, NRTC is routinely required to pay significantly more than comparably sized cable operators are required to pay for the same programming. In some cases, NRTC is required by large, vertically-integrated satellite broadcast and programming vendors to pay up to 300% or more than cable rates. Unfortunately, NRTC is prohibited by confidentiality restrictions from disclosing specific discriminatory pricing, terms and conditions contained in many of its C-Band distribution agreements.

In the DBS market, the competitive problem goes far beyond pricing discrimination. As a DBS distributor, NRTC has no access whatsoever -- at any price -- to the popular programming of two of the largest, most vertically-

integrated cable programmers: Time Warner and Viacom. Time Warner and Viacom entered into exclusive, anticompetitive DBS program distribution arrangements with United States Satellite Broadcasting Co., Inc. ("USSB") for the specific purpose of blocking access to Time Warner's and Viacom's programming (e.g., HBO, Showtime, VH-1, MTV, Nickelodeon, FLIX) by NRTC and other DBS distributors.

The Commission correctly recognizes in this proceeding that all distributors need access to desirable, reasonably priced programs. Without full and fair access to programming that appeals to the marketplace, MVPDs cannot compete effectively. Access to programming is essential to the entry and survival of competing distribution technologies.

The major cable MSOs continue to thwart the competitive potential of HSD and DBS by ignoring the Program Access requirements. As a result, full and fair access to both C-Band and DBS programming at nondiscriminatory rates is still largely unavailable to rural Americans even at this late date.

To monitor and combat these problems, the Commission should obtain comprehensive annual reports from the programming vendors; prohibit abusive practices by rule; make it clear that damages will be awarded for Program Access violations; and banish the type of exclusionary arrangements represented by the USSB/Time Warner/Viacom deal.

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NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

The National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Comments, pursuant to Sections 1.415 and 1.430 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), in response to the Commission's Notice of Inquiry ("Notice"), released in the above-captioned proceeding on May 19, 1994.^{1/}

^{1/} Notice of Inquiry, FCC 94-119 (released May 19, 1994).

I. PRELIMINARY STATEMENT

1. In this proceeding, the Commission is gathering information necessary for its compliance with a statutory directive in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") to report annually to Congress on the status of competition in the market for the delivery of multichannel video programming. The Commission seeks to prepare a preliminary analysis for Congress on the current state of competition to cable provided by alternative distribution technologies. The Commission also intends to determine whether the conduct and practices of cable operators, vertically-integrated programming vendors and competing multichannel video programming distributors ("MVPDs") has changed as a result of the 1992 Cable Act and the Commission's implementing rules.

2. Having been extensively involved in Program Access issues before the Commission and the Congress since its incorporation in 1986, NRTC welcomes this opportunity to share its experiences as an MVPD serving rural areas of the country through Home Satellite Dish ("HSD") and Direct Broadcast Satellite ("DBS") technologies. Although NRTC is pleased to report to the Commission that many vertically-integrated cable programmers have adjusted their pricing practices and other conduct following passage of the 1992 Cable Act and adoption of the Commission's implementing rules, major stumbling blocks

continue to prevent NRTC from obtaining full access to satellite delivered programming on fair and nondiscriminatory terms and conditions.

3. NRTC's experience to date shows that the more vertically-integrated the programmer, the more likely its pricing and conduct will be unjustly discriminatory toward competing MVPDs. In the C-Band distribution market, pricing discrimination by certain satellite carriers and vertically-integrated cable programming vendors remains a problem for NRTC. In the DBS market, access to key programming has been denied NRTC by two major vertically-integrated cable programmers that have suppressed competition by entering into exclusive arrangements with a single DBS distributor. As a result of the large, vertically-integrated cable programmers' select usage of exclusive distribution arrangements, the potential of DBS as a competitive force to cable is being stifled.

II. BACKGROUND

4. NRTC is a non-profit corporation, owned and controlled by 523 rural electric cooperatives and 276 rural telephone systems located throughout 48 states. NRTC was incorporated on August 6, 1986, through the joint efforts of the National Rural Electric Cooperative Association ("NRECA," the national service organization for rural electric cooperatives), and the National Rural Utilities Cooperative Finance Corporation ("CFC," the private national financing

organization owned by rural electric cooperatives) in conjunction with the National Telephone Cooperative Association ("NTCA," the national service organization of rural telephone systems).

5. NRTC's mission is to assist member companies in meeting the telecommunications needs of more than 25 million consumers who live in the rural areas of the United States. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America on an affordable basis, in an easy and convenient manner -- just like cable television services are provided in urban America.

6. C-Band Technology. NRTC and its Members currently provide various packages of C-Band satellite-delivered programming, called "RuralTV®," to more than 80,000 rural HSD subscribers equipped with 6 to 12 foot receiving antennas. NRTC's C-Band programming packages are based on the cable model. NRTC offers basic packages with an option to add network services, premium channels and other "tiers" of programming, including additional basic services, superstations and regional sports networks.

7. NRTC provides the same administrative marketing and consumer support to programmers through the use of C-Band delivery technology as does a

cable operator using hard-wired cable. NRTC renders one monthly payment for all of its subscribers, just like a cable operator. By using its own "port" at the General Instrument ("GI") DBS Authorization Center, NRTC directly authorizes and controls the subscribers' descramblers without the need for additional costs to satellite cable or broadcast programmers.

8. Direct Broadcast Satellite. On April 22, 1992, NRTC signed an Agreement with Hughes Communications Galaxy, Inc. ("Hughes"), to provide the first high-powered DBS services ("DirecTV®") to subscribers across the country. Under the Agreement, NRTC, its Members and affiliated companies contributed in excess of \$100,000,000 to purchase satellite capacity and other necessary services to market and distribute popular cable and broadcast television programming to more than 8 million rural households equipped with 18-inch DBS satellite receiving antennas.

9. On December 17, 1993, the first DBS satellite was launched from French Guiana.^{2/} After a testing period, commercial service became available in certain parts of the country on June 17, 1994, and will become available throughout the country over the next few months. When the second DBS satellite is launched this summer and the system is fully deployed in September of

^{2/} NRTC/Hughes and United States Satellite Systems ("USSB"), a separate DBS licensee, will utilize the same satellite.

1994, more than 150 DirecTV® channels of movies, sports, networks, cable and other entertainment and information services are expected to be available to subscribers across the continental United States.

10. Under its Agreement with Hughes, NRTC/Hughes will operate an independent DBS delivery system comprised of uplinking and control services necessary to send signals to the satellite and maintain its operation, ground services, security services, authorization and billing services and office support and related services. The NRTC/Hughes "stand-alone" DBS delivery technology is equivalent to a hard-wired cable operator's system for purposes of receiving programming and distributing it to the end-user consumer. No additional costs will be incurred by programmers serving NRTC through the DBS system as compared to serving a cable operator using hard-wired delivery technology.

11. FCC Cable Report. In its Cable Report concerning Competition, Rate Deregulation and the Policies Relating to the Provision of Cable Service, released June 31, 1990, the Commission recommended that Congress take action to promote the emergence of alternative multichannel distributors, including those using HSD and DBS distribution technologies. The Commission found that

emerging alternative multichannel video providers could provide vigorous competition to cable -- if they gain fair access to programming.^{3/}

12. Program Access Legislation. In an attempt to gain fair access to programming, NRTC and NRECA and their members, primarily consumer owned cooperatives, were actively involved with Congress in the development of Section 19 of the 1992 Cable Act, the so-called Program Access provisions. NRTC testified repeatedly before Congress concerning the necessity of Program Access legislation.^{4/} NRTC also addressed the issue of discriminatory pricing in numerous Commission proceedings.^{5/} NRTC reported to the Congress and to the Commission that it was required to pay satellite cable and broadcast programmers for C-Band programming, on average, ~~460%~~ of the rates that small

3/ Cable Report, 5 FCC Rcd 4962, 4972, 5020 (1990).

4/ See, e.g., Statement of Bob Phillips, Chief Executive Officer, NRTC, Hearings Regarding the Cable Television Consumer Protection Act of 1991, S. 12, Communications Subcommittee, Senate Committee on Commerce, Science and Transportation, March 14, 1991.

5/ See, Comments and Reply Comments of NRTC in MM Docket No. 89-600, Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, March 1, 1990, and April 2, 1990, respectively; Comments and Reply Comments of NRTC in General Docket No. 89-88, Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, June 30, 1989, and July 31, 1989, respectively; and Further Comments and Further Reply Comments of NRTC, Id., August 27, 1990 and October 23, 1990, respectively.

cable companies were required to pay for the identical programming.^{6/} With respect to satellite broadcast programming alone, NRTC notified the Congress and the Commission that it was required by satellite carriers uplinking over-the-air broadcast signals to pay 500% to 800% of the rates cable operators were required to pay for the same satellite carriage of the same broadcast signals.^{7/}

13. FCC Program Access Proceeding. NRTC participated extensively in the Commission's proceeding implementing the Program Access provisions of the 1992 Cable Act.^{8/} Following adoption of the First Report and Order in that proceeding,^{9/} NRTC commended the Commission for its landmark decision to prohibit discrimination in the provision of video programming. NRTC pointed out on reconsideration, however, that the Commission's Program Access rules contain two glaring "loopholes:" first, they do not allow for an award of damages

6/ In dollars and cents, this meant that NRTC was required to pay more than \$10 at wholesale for 18 channels while a small cable operator serving the same or fewer subscribers would pay less than \$2.25 for the same 18 channels.

7/ When NRTC filed Formal Complaints against the satellite carriers alleging violations of the antidiscrimination provisions contained in Section 202 of the Communications Act, they were dismissed by the Commission on the ground that the then existing nondiscrimination requirements did not apply to noncommon carriers. NRTC v. Southern Satellite Systems, Inc., 7 FCC Rcd 3213, 3214 (1992).

8/ Notice of Proposed Rulemaking, MM Docket No. 92-265, 58 Fed. Reg. 328 (January 5, 1993); Comments and Reply Comments of NRTC, January 25 and February 16, 1993, respectively.

9/ Program Access Decision, 58 Fed. Reg. 27658 (May 11, 1993).

for a Program Access violation, and, second, they fail to implement fully the Congressional ban against exclusive arrangements in areas unserved by cable. Cf., 47 U.S.C. 628(c)(2)(C), 47 C.F.R. 76.102(c)(1).^{10/}

III. COMMENTS

14. NRTC supports wholeheartedly the Commission's statement in its Notice that all distributors need access to desirable, reasonably priced programs.^{11/} As the Commission noted, the ability of MVPDs to compete effectively depends on their ability to offer video programming that appeals to the marketplace. As a result, as the Commission recognized, access to programming on fair, reasonable and nondiscriminatory terms is "essential to the entry and survival of competing distribution technologies."^{12/} Conduct by large vertically-integrated programming vendors, however, has stifled the program distribution market.

15. While some C-Band programming vendors have adjusted their pricing practices in line with the Commission's Program Access requirements,

^{10/} See, Petition for Reconsideration of NRTC, MM Docket No. 92-265, June 10, 1993; Reply of NRTC, MM Docket No. 92-265, July 28, 1993.

^{11/} Notice, ¶ 65.

^{12/} Id.

other large, vertically-integrated programmers and carriers have not. To effectuate access to programming, this type of conduct must be subject to sanction by the Commission. The Commission has ample authority under the 1992 Cable Act to order "appropriate remedies" for Program Access violations. 47 U.S.C. 628(e)(1). Without the possibility of an award of damages to an aggrieved MVPD following successful prosecution of a Formal Complaint at the Commission, the Program Access rules will lack the regulatory "teeth" necessary to combat this long standing and continuing problem.^{13/}

16. In the DBS market, the competitive problem goes far beyond pricing discrimination. NRTC has no access whatsoever -- at any price -- to the popular programming of two of the largest, most vertically-integrated cable programmers: Time Warner and Viacom. Time Warner and Viacom entered into exclusive DBS program distribution arrangements with United States Satellite Broadcasting Co., Inc. ("USSB") for the specific purpose of blocking access to Time Warner's and Viacom's programming (e.g., HBO, Showtime, VH-1, MTV, Nickelodeon, FLIX) by NRTC and Hughes at 101°. This is diametrically opposed

^{13/} Members of Congress who were instrumental in passage of the Program Access provisions of the 1992 Cable Act share NRTC's concern that without the threat of damages, programmers will lack the motivation to comply with the Commissions' requirements. See, e.g., Letter to the Honorable Reed Hundt from Representatives Billy Tauzin, Rick Boucher, Ron Wyden, Jim Cooper, Jim Slattery, Blanche Lambert, Ralph Hall and Mike Synar, dated June 15, 1994, which is attached hereto as Attachment A.

to the Program Access requirements mandated by Congress.^{14/} Vertically-integrated programmers such as Time Warner and Viacom may not lawfully enter into exclusive arrangements that prevent distributors such as NRTC from obtaining programming, especially for distribution to persons in areas not served by a cable operator. 47 U.S.C. 628(c)(2)(C).

17. The large, vertically-integrated cable programmers continue to thwart the competitive potential of HSD and DBS by ignoring the Commission's Program Access requirements. Pricing discrimination is commonplace. Abusive negotiating practices are widespread. Programming is denied to competing distribution technologies.^{15/} As a result, full and fair access to both C-Band and DBS programming at nondiscriminatory rates is still largely unavailable to rural Americans even at this late date.

18. To combat these problems, the Commission must make it clear that damages will be awarded for Program Access violations and that the type of

^{14/} Members of Congress also have expressed extreme concern regarding this major "loophole" in the Commission's Program Access rules and its exploitation by the large, vertically-integrated cable programmers. *Id.*

^{15/} On June 1, 1994, the Commission denied Time Warner Cable's petition for exclusivity for Court TV, thereby finally ensuring the availability of this programming to certain competitors of Time Warner. *Time Warner Cable*, CSR-4231-P, released June 1, 1994. Access to Time Warner's programming for distribution in the DBS market, however, remains blocked.

exclusionary arrangement represented by the USSB/Time Warner/Viacom deal is prohibited by the Commission's rules.^{16/}

A. Certain C-Band Programming Vendors Continue to Discriminate Against NRTC as an HSD Distributor.

19. Following enactment of the 1992 Cable Act and adoption of the Commission's implementing rules, some C-Band programmers adjusted their pricing structures in line with the new legal and regulatory requirements. In particular, NRTC applauds the following vertically-integrated C-Band programmers for their timely implementation of revised C-Band pricing structures for NRTC:

- The Discovery Channel
- Country Music TV

^{16/} In its Notice, the Commission recognizes that resolution of the issues raised by NRTC and others on reconsideration of the Program Access decision could affect the state of competition in the multichannel marketplace. Notice, ¶ 11. The Commission states, however, that it does not intend to consolidate these and other pending issues within the present inquiry. Id. NRTC appreciates the Commission's intention to resolve these issues formally within the context of other proceedings. To be effective, however, the Commission's assessment of the status of competition in the delivery of video programming must include the question of damages for a Program Access violation, as well as a full analysis of the scope of the Commission's ban against exclusive arrangements by large, vertically-integrated programmers. Without consideration of these critical issues, NRTC submits that the Commission's analysis and resulting report to Congress will be grossly incomplete.

- The Family Channel
- The Nashville Network
- VH-1
- Nickelodeon, and
- MTV

NRTC's experience with these C-Band programmers suggests that they have complied with the Commission's Program Access requirements.

20. Another group of programmers falls into a "middle ground." Since passage of the 1992 Cable Act and adoption of the Commission's rules, this group's C-Band pricing structures have been adjusted toward comparable cable rates but are still short of parity. Their current C-Band rates, however, generally exceed their cable rates well beyond the 5% de minimis level.^{17/}

21. The most egregious cases involve a group of larger, vertically-integrated satellite broadcast and cable programming vendors. NRTC is routinely required by this group to pay significantly more than comparably sized cable

^{17/} In its Program Access decision, the Commission placed a higher burden of proof on a complainant if the complaint is based on a de minimis price differential (i.e., five cents per subscriber or five percent, whichever is larger). The Commission emphasized, however, that this approach did not establish any per se zone of reasonableness in pricing, nor did it allow any vendor to automatically charge an MVPD a surcharge of five cents per subscriber or five percent over its competition. Program Access Decision, supra at ¶ 133.

operators are required to pay for the same programming. In NRTC's view, this group continues to discriminate against NRTC as a C-Band distributor in clear violation of the 1992 Cable Act and the Commission's Program Access requirements.^{18/} To the extent permitted, some egregious cases are discussed below. As NRTC is prohibited by confidentiality restrictions from discussing specific terms and conditions contained in many of these distribution agreements, however, NRTC is able at this point to provide only generalized information to the Commission.

1. Satellite Broadcast Programming Vendors.

22. Certain large, vertically-integrated Satellite Broadcast Programming Vendors (or "satellite carriers") continue to ignore the Commission's Program Access requirements. Satellite carriers neither own nor originate these signals. They merely re-transmit them for HSD, cable, MMDS, SMATV and other distribution. The satellite carrier uplinks the same signal in the same scrambled format to the same satellite transponder for the wholesale distribution market. From the satellite transponder, the scrambled signal is "handed-off" or down-linked either to cable, SMATV or MMDS "head-ends" or to the premises of an

^{18/} Presently, negotiations with these program vendors have stalled and NRTC is considering the initiation of Formal Complaints, in accordance with Section 76.1003 of the Commission's rules. 47 C.F.R. 76.1003.

HSD subscriber. Cost differences to the carrier in serving different distributors are de minimis and cannot justify the pricing differences described below.

23. EMI. EMI Communications Corporation ("EMI") has a Tariff on file with the Commission, publicly listing both its C-Band and cable distribution rates for WWOR-TV (New York) and WSBK-TV (Boston)^{19/} Under the Tariff, NRTC presently may obtain these services as an HSD distributor for \$1.25 per subscriber per month. This rate is derived based on NRTC's current market penetration level of between 30% and 40% (\$1.35) and subscriber level of 25,000 (\$.10 discount). After subtracting copyright payments (\$.14 for WWOR and \$.175 for WSBK),^{20/} NRTC's effective rate for the programming from EMI is **\$.935** per subscriber per month.

24. For purposes of comparison, a cable operator purchasing carriage of these same signals from EMI and serving the same number of subscribers as NRTC (25,000) at the same penetration level as NRTC (30% - 40%) can obtain EMI's programming under EMI's Tariff at a rate of only **\$.48** per subscriber per

^{19/} Tariff FCC No. 14, issued on November 15, 1993, and effective on November 16, 1993.

^{20/} Unlike cable distribution, satellite carriers are required to pay applicable copyright fees for C-Band distribution of programming. 17 U.S.C. § 119. As a result, for purposes of comparing NRTC's rates from satellite carriers to the rates offered by the carrier to comparably sized cable operators, NRTC has reduced its actual rates by the carriers' cost of copyright payments.

month: \$.40 for WWOR-TV and a "grandfathered" rate of \$.08 for WSBK-TV.^{21/}

25. Under NRTC's present penetration and subscriber levels, EMI requires NRTC to pay almost 200% of the rate that a comparably sized cable operator is required to pay for the same programming (\$.935 vs. \$.48). NRTC is aware of no differences in the cost of creation, sale, delivery or transmission of EMI's programming or any other basis that would justify a 200% differential in the effective rates charged by EMI to NRTC as compared to cable operators.

26. At increased penetration and volume levels, EMI's rates are even more discriminatory. If NRTC were to guarantee a penetration level in the range of 80-95%, with 80,000 subscribers, NRTC's effective rate for WWOR/WSBK would be \$.685 (\$1.00 minus \$.315 for copyright payments). No volume discount would be available to NRTC because EMI has "locked" its HSD rates at \$1.00 unless penetration is greater than 95%.^{22/} Cable operators can purchase these signals at these penetration and subscriber levels for \$.18 (\$.10 for WWOR and

^{21/} EMI "grandfathered" its WSBK rate for all cable operators contracting with EMI for WSBK-TV before November 15, 1993. Tariff No. 14, supra, at 8th Revised Page 24. NRTC is aware of no cable operators contracting with EMI for WSBK after November 15 or paying more than \$.08 for WSBK. NRTC first contracted with EMI to distribute WSBK-TV on January 1, 1991. The \$.08 rate from EMI for WSBK, however, is unavailable to NRTC.

^{22/} Tariff No. 14, supra, at 8th Revised Page 28.

the "grandfathered" rate of \$.08 for WSBK).^{23/} At these levels, NRTC would be required to pay more than 380% of EMI's cable rate.

27. United Video. A similar problem exists with the satellite carrier United Video, Inc. ("UVI") in connection with its carriage of the WGN/KTVT/WPIX signals. NRTC is prevented by confidentiality restrictions, however, from disclosing to the Commission the specific terms and conditions of its agreement with UVI.

28. Netlink. The same type of problem exists with Netlink, regarding its C-Band distribution rate to NRTC for five Denver signals: KCNC (NBC), KMGH (CBS), KUSA (ABC), KRMA (PBS), and KWGN. Although Netlink's rate to NRTC has decreased somewhat since passage of the 1992 Cable Act, it is still substantially disproportionate to its cable rate. Again, however, NRTC is prevented by confidentiality restrictions from disclosing the terms and conditions of its agreement with Netlink.

^{23/} Under the Tariff, large MSOs also receive additional substantial discounts based on "caps," prepayments and other conditions.

2. Satellite Cable Programming Vendors.

29. Although the most common abuses occur with large vertically-integrated satellite carriers, NRTC still experiences significant and unjustified pricing discrimination from large, vertically-integrated satellite cable programming vendors even at this late date. One programmer actually increased its rates since passage of the 1992 Cable Act; another refused any adjustment whatsoever.

30. Comedy Central. In 1993, NRTC was required to pay Comedy Central substantially more than Comedy Central's cable rate.^{24/} In 1994, following the Commission's implementation of the Program Access rules, NRTC's C-Band distribution rate actually was increased significantly by Comedy Central. Again, however, confidentiality restrictions prevent NRTC from disclosing specific pricing information to the Commission. NRTC is aware of no legitimate justification for this rate increase.

31. Lifetime. NRTC's C-Band distribution rate from Lifetime did not change following passage of the 1992 Cable Act. In 1993, while it was still vertically-integrated through an ownership interest by Viacom, NRTC was required to pay Lifetime substantially more than Lifetime's cable rate. In 1994, Lifetime's C-Band rate for NRTC continued to exceed cable by the same

^{24/} Comedy Central is owned by Time Warner and Viacom.

percentage, although confidentiality restrictions prevent disclosure of the specific rates. On or about April 5, 1994, Lifetime restructured its ownership and apparently is no longer vertically-integrated. NRTC is aware of no legitimate justification for this pricing disparity during the period within which Lifetime was subject to the Program Access requirements as a vertically-integrated programmer.

3. Large Cable MSO Tactics.

32. Many of the large, vertically-integrated broadcast and cable programmers utilized what NRTC considers to be abusive tactics during the course of negotiations with NRTC concerning C-Band distribution rates. The largest vertically-integrated programmers did their best to circumvent the Commission's Program Access requirements during negotiations.

33. For instance, some programmers offered slight reductions in rates, but in return for access to the desired programming NRTC was required to agree not to file a Program Access complaint at the FCC. Some programmers construed the Commission's "5% guideline" as a "safe harbor, contrary to the Commission's specific instructions."^{25/} Others offered token reductions in rates to some MVPDs, then claimed that their "hands were tied" by the law from

^{25/} See n. 17, *supra*.

offering better rates (which were actually nondiscriminatory rates) to NRTC. Still others required NRTC to enter into unfairly restrictive confidentiality agreements which prohibit NRTC from disclosing certain abusive practices to the Commission. EMI, as discussed above, even went so far as to file public Tariffs "grandfathering" its pre-existing cable rates, in blatant defiance of the Commission's Program Access requirements.^{26/}

B. The USSB/Time Warner/Viacom DBS Exclusivity Deal Creates the Most Severe Competitive Problem in the Satellite Industry.

34. NRTC and Hughes have been successful in compiling a variety of programming for their DBS project. Unfortunately, however, the largest, vertically-integrated cable programmers -- Time Warner and Viacom -- chose to enter into exclusive arrangements with USSB for DBS distribution of their programming. As a result, some of the most popular cable programming -- including HBO, Showtime, Nickelodeon, VH-1, MTV -- is unavailable for distribution via DBS by NRTC or Hughes from the 101° orbital location.

^{26/} Nothing in the Commission's rules permits EMI to "grandfather" its cable rates. To the contrary, the entire Program Access scheme was designed to break the cable industry's long-standing discriminatory pricing structure, not to "grandfather" it.

35. The USSB/Time Warner/Viacom exclusivity arrangement permits the cable MSOs to sell an array of critical programming on an exclusive basis for distribution by USSB, while denying NRTC/Hughes access to the full menu of key programming considered necessary to attract subscribers. As NRTC/Hughes are the only other entities providing full high powered DBS service at 101°, the USSB/Time Warner/Viacom exclusivity arrangement is permitting the cable industry to "split" the 101° slot. USSB has access to HBO, Showtime, Nickelodeon, VH-1, MTV, etc.; NRTC/Hughes does not.

36. The large vertically-integrated MSOs already are exploiting the unfair competitive advantage granted to them by the USSB/Time Warner/Viacom deal. They own the medium powered "DBS" service known as "Primestar," and they are competing directly with the DBS services offered by NRTC/Hughes and USSB at 101°. They have access to and plan to offer the programming of Time Warner and Viacom. Meanwhile, NRTC/Hughes is blocked from accessing or offering that same programming. The USSB/Time Warner/Viacom deal makes it impossible for NRTC/Hughes to compete with the vertically-integrated programmers on a level playing field.

37. Primestar entered into a consent decree with the Department of Justice to settle antitrust litigation involving cable programming access by distributors that compete with the partner MSOs. In addition, Primestar and its